Comcast carried it broadly.[83]

2. Demographics

Relying on testimony from Tennis Channel expert Timothy Brooks, the Presiding Judge found that Tennis Channel, Golf Channel, and Versus all target affluent adult viewers.[84] The evidence also showed that the channels were "male-skewed" in their gender composition, delivering approximately [redacted].[85] Comcast's executives admitted that tennis and golf are similar in their audience appeal and that the demographics of tennis viewers track closely with the demographics of viewers who watch Versus's most popular programming.[86]

In its Exceptions, Comcast does not plausibly challenge the gender and income similarities among the networks. It quibbles instead about a supposed inconsistency between an age *range* cited by the Initial Decision and a *median age*.[87] But even this criticism is unfounded. Relying on Mr. Brooks's "creditable" testimony, the Presiding Judge found that all three networks target viewers in the overlapping [redacted] or [redacted] age brackets.[88] Even on Comcast's "median age" metric, the Presiding Judge found that "[t]he median viewer ages of

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83 Initial Decision ¶ 58.

84 To reach this conclusion, the Presiding Judge cited 2010 MRI data relied on by Mr. Brooks in his direct testimony, while rejecting Mr. Egan's Experian Simmons 2009 and 2010 data as not "credible." *Id.* ¶¶ 37-39.

85 *Id.* ¶ 42.

86 Tennis Channel Ex. 40, at COMTTC 00011537, 11542; Tennis Channel Ex. 108; [redacted]; Egan Tr. at 1671:15-1672:22. Comcast also admitted in its Answer that viewers of both Tennis Channel and Golf Channel are among the highest-income households. Comcast Answer ¶ 99.

87 Exceptions at 25-26.

88 Initial Decision ¶¶ 43-44 ("Although Comcast Cable correctly notes that the median audience ages of the three networks are somewhat different, the undisputed record evidence establishes that companies use age ranges — not median ages — to market their networks to advertisers.").

[the three networks cited by Comcast and submitted by its expert] are consistent with — indeed corroborate — Tennis Channel's showing that the three networks target the same age groups."[89]

3. Similar Advertisers

Relying on testimony and data proffered by Tennis Channel's head of advertising, the Presiding Judge held that Tennis Channel, Golf Channel, and Versus sell and compete to sell advertising to a largely overlapping pool of companies.[90] He found, for example, that in 2010, [redacted] of Golf Channel's revenue from its 30 largest non-endemic advertisers, and [redacted] of Versus's, came from companies that had recently either purchased or considered formal proposals for purchasing advertising on Tennis Channel.[91] He also found that out of Tennis Channel's 30 largest advertisers in 2010, [redacted] advertised on Golf Channel that year, and [redacted] advertised on Versus.[92] Comcast had no effective response to this data at the hearing, and it does not challenge these findings in its Exceptions.

4. Similar Ratings

Comcast does not dispute the Initial Decision's holding that "Tennis Channel, Golf Channel, and Versus have remarkably similar ratings,"[93] or its reliance on Mr. Brooks's "systematic ratings comparison of the three channels," which "persuasively establish[ed] Tennis Channel, Golf Channel, and Versus to be similarly situated in viewer appeal."[94] Nor could it; as

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89 *Id.* ¶¶ 44 & n.150 (Tennis Channel's median age was [redacted], placing it [redacted] the median ages of Golf Channel and Versus).

90 Initial Decision ¶¶ 24, 40, 45-47, 106. The Presiding Judge expressly rejected Comcast's effort to discredit this testimony and data. *Id.* ¶ 45 n.154, 46 n.156.

91 *Id.* ¶ 45; *see also* Tennis Channel Ex. 15, Herman Written Direct ¶¶ 8-9 & Ex. B.

92 Initial Decision ¶ 46; *see also* Herman Written Direct ¶ 10 & Ex. C.

93 *Id.* ¶ 48.

94 *Id.* ¶¶ 48-49. In its witness statements and post-trial briefing, and on cross-examination, Comcast repeatedly tried to discredit Mr. Brooks' use of industry-standard coverage area ratings

the Initial Decision observed, Comcast did not present any ratings data at all.[95]

Instead of disputing the ratings analyses substantively, Comcast argues only that "ratings are of minimal importance to MVPDs."[96] Again, Comcast claims that the Initial Decision "ignores" this point,[97] but in fact, the Presiding Judge found the argument unpersuasive. The Initial Decision relied on ratings to evaluate the *similarity* among the three networks, as the Commission has directed,[98] as well as to reject Comcast's contention that "'there is no significant subscriber demand for Tennis Channel, whereas there is significant subscriber demand for Golf Channel and Versus.'"[99]

Moreover, the record belies Comcast's litigation claim that ratings are of "minimal importance" to MVPDs: Comcast uses ratings to analyze networks.[100] By contrast, it

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from Nielsen Media Research without presenting any contrary data of its own. *See, e.g.*, Post-Trial Brief of Defendant Comcast Cable Communications, LLC, at 55 (Jun. 21, 2011). But the Presiding Judge rejected Comcast's arguments and concluded instead that "[t]he weight of reliable evidence and logic supports the use of coverage area ratings as a valid method of comparing" the networks. *Id.* ¶ 49. Comcast does not dispute that holding here.

95 Initial Decision ¶ 49. Moreover, while Mr. Brooks is a leader in the field of audience research, having won numerous accolades for his contributions, Comcast's only programming expert [redacted] *Compare* Brooks Tr. at 695:12-701:9 *with* Tennis Channel Ex. 141, Deposition of Michael Egan, at 201:25-203:11. Comcast simply offered no witness with meaningful ratings expertise. *See* Egan Tr. 1655:16-18 (Mr. Egan testifying that he "did [not] offer an alternative ratings analysis" to respond to the analysis of Mr. Brooks), 1662:10-15 (Mr. Egan testifying that he "wouldn't claim to have" the same background that Mr. Brooks has in the ratings industry).

96 Exceptions at 25.

97 *Id.*

98 *Second Report & Order* ¶ 14 (identifying "ratings" as one of the factors that may be used to establish that networks are similarly situated).

99 Initial Decision ¶ 49 n.177 (citing Proposed Reply Findings of Fact & Conclusions of Law of Defendant Comcast Cable Communications, at ¶ 265 (Jun. 7, 2011)).

100 *See, e.g.*, Tennis Channel Ex. 82 [redacted]

does not use the "programming expenditures" metric created for litigation by Comcast's expert economist Jonathan Orszag.[101] The Presiding Judge properly held that "[r]ating data measuring subscriber viewing of the respective networks provide a more direct and more accurate measure of viewer appeal than programming expenditures."[102]

5. Comcast Concessions of Similarity

Comcast's own documents recognize the similarity among these networks. For instance, Versus CFO Kim Armor identified Tennis Channel as Versus's "competitive sports network[]."[103] And when Comcast evaluated whether it should seek to acquire equity in Tennis Channel, Comcast executives considered Golf Channel and Versus to be the best comparables to Tennis Channel among the Comcast affiliates.[104]

6. Michael Egan's Discredited Analysis

Comcast complains that the Presiding Judge failed to consider the arguments of its programming expert Michael Egan.[105] But in fact, the Presiding Judge analyzed Mr. Egan's testimony extensively and correctly rejected it as "not credible" and "inconsistent," expressing

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[redacted]; Egan Tr. at 1743:19-1744:14; Bond Tr. at 2201:12-17.

101 [redacted]; Rigdon Tr. at 1884:2-19; Bond Tr. at 2255:12-16.

102 Initial Decision ¶ 50-52 (finding more "persuasive[]" the contrary testimony of Tennis Channel's expert economist, Dr. Singer, who testified that expenditures were not a valid proxy for the value or quality of a network's programming); *see also* Orszag Tr. 1226:1-9 (Orszag acknowledging that his metric is "not perfect").

103 Tennis Channel Ex. 82, at COMTTC_00010949; Egan Tr. at 1744:5-18.

104 Comcast even consulted Golf Channel's SVP of Advertising regarding Tennis Channel's advertising projections because his "expertise was in sports advertising." *See* Tennis Channel Ex. 39, at COMTTC_00009009; [redacted]; Donnelly Tr. at 2547:14-2548:1. Moreover, Comcast recognizes the inherent similarities among sports networks: in 2009, it combined its advertising sales forces for Golf Channel and Versus, acknowledging that many companies "already advertise[d] across both networks." Tennis Channel Ex. 67; *see also* Donnelly Tr. at 2549:8-2550:2.

105 Exceptions at 26-28.

"serious doubt [about] Mr. Egan's impartiality as a testifying witness since [he may have given] intentionally crafted testimony hoping to win a predetermined outcome."[106]

For instance, Mr. Egan candidly acknowledged that he discarded the "genre analysis" he employed in *WealthTV*, a case in which the ALJ and the Commission found that the networks involved were not similarly situated, because that analysis would show similarity among the programming of the three networks involved in this case.[107] Mr. Egan's need to discard his previously-employed methodology, because it proved Tennis Channel's case, led the Presiding Judge to conclude correctly that Mr. Egan's "newly-coined . . . methodology may have been concocted for this case" and should be "rejected as unreliable."[108]

Comcast also faults the Presiding Judge for eliciting testimony from Mr. Egan that was "outside the scope of the witness's written testimony."[109] But that is, of course, no basis for reversal — it was entirely appropriate for the Presiding Judge to question Mr. Egan himself and then consider all of his testimony. Comcast cannot fairly criticize the Judge for asking questions, particularly when, far from objecting to them at the time, Comcast's counsel

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106 Initial Decision ¶¶ 27-36.

107 *Id.* ¶ 28; Egan Tr. at 1598:11-1599:19, 1600:7-12.

108 Initial Decision ¶¶ 29. Instead, the Presiding Judge credited Tennis Channel's television industry expert, Timothy Brooks, and cited his testimony as evidence of the networks' programming similarity. *Id.* ¶ 25. The contrast between Comcast's industry expert and Tennis Channel's is stark. While Mr. Egan [redacted], Mr. Brooks had substantial familiarity with all three networks prior to his involvement in this litigation and is one of the country's leading authorities on the subjects of his testimony. Comcast Ex. 349, Deposition of Timothy Brooks, at 282:16-20, 294:21-24; Brooks Tr. at 700:18-701:4; *see also* Brooks Written Direct, at 36-38 (detailing Mr. Brooks' extensive experience); Brooks Tr. at 696:4-17, 697:3-699:16 (same).

109 Exceptions at 26-27.

encouraged the Presiding Judge to engage in the very questioning for which it now faults him.[110]

C. Comcast's Inferior Treatment Of Tennis Channel Was Motivated By Affiliation.

The similarity among the networks, and their starkly different treatment by Comcast, show that Comcast's carriage decisions are driven by affiliation. Comcast's arguments to the contrary only fortify the finding.

1. The Record Provides Ample Evidence of Discrimination

The differences between Comcast's treatment of its channels and its treatment of Tennis Channel are striking. Versus and Golf Channel enjoy the broadest carriage from Comcast, reaching [redacted] of Comcast's customers.[111] This carriage is unrelated to merit: Golf Channel received broad carriage when it was a "fledgling network" because Comcast wanted it to succeed; Versus retained this carriage even as Comcast's head of programming called it "dead in the water," and even as Comcast completely rebranded the channel in an effort to help it succeed; and Comcast introduced no record evidence that it had *ever* identified benefits of either channel (beyond affiliation) that justified their broad carriage or their significant licensing fees.[112] The same priority of affiliation over merit is true for other sports channels in which Comcast acquires an equity interest — its acquisition of that interest is perfectly linked in time to its grant of broader carriage.[113]

Despite being similarly situated and a fraction — [redacted] — of the

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110 *See, e.g.*, Tr. at 1534:1-3 (following a lengthy exchange between the Presiding Judge and Mr. Egan, Comcast counsel remarked to the Judge, "Your questions are much better than mine, if you want to keep going.").

111 Initial Decision ¶ 54.

112 *Id.* ¶ 55 n.192 (citing Tennis Channel Exs. 61 & 21); *id.* ¶ 58; Orszag Tr. at 1275:8-19; Bond Tr. at 2225:21-2228:8, 2234:15-2235:7, 2297:12-20; Gaiski Tr. at 2419:2-5.

113 Initial Decision ¶ 59.

price, Tennis Channel receives a sliver — approximately [redacted] — of the carriage that Versus and Golf Channel receive.[114] It receives this carriage on the sports tier, to which no Comcast-affiliated channel has ever been relegated.[115]

Carriage is but one of the benefits Comcast differentially grants its affiliates. Comcast's own papers — with their protestation of how large a change it would be if Tennis Channel were to be moved into the channel range of Versus and Golf Channel[116] — speak to the marked difference in channel placement. Comcast has given its channels the most favorable channel placement, while it has relegated Tennis Channel to placements as remote as the 700 range.[117]

Inherent in the very passage of Section 616 is the explanation for this different treatment: the drafters of Section 616 adopted it because vertical integration gives cable companies "the incentive and ability to favor their affiliated programming services."[118] The Presiding Judge recognized that Comcast discriminated on just this basis, finding that Comcast has a "clear economic incentive to retain popular *unaffiliated* networks on the sports tier" and to "protect its affiliated sports networks."[119] The record provided ample evidence proving that Comcast acted on this incentive, showing that Comcast repeatedly took special steps for its

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114 *Id.* ¶¶ 54, 77 & n.256.

115 *Id.* ¶ 57.

116 *See, e.g.*, Comcast Conditional Petition for Stay, at Ex. A.

117 Initial Decision ¶¶ 53, 61.

118 Senate Report at 25.

119 Initial Decision ¶¶ 79-80. As Comcast executive Gregory Rigdon admitted at trial, owning equity in a network allows Comcast to share in the increased value that results from broader distribution, and Comcast "therefore . . . would have an incentive to distribute [its affiliated networks] more broadly." Rigdon Tr. at 1922:3-1923:15.

channels only: it treats them like "siblings" instead of "strangers,"[120] and it grants them special benefits by virtue of affiliation.[121] Comcast never, on the other hand, considered providing Tennis Channel with these benefits.

Tennis Channel established an even more specific incentive for Comcast to discriminate on the basis of affiliation — Comcast's desire to acquire tennis programming for Versus that Tennis Channel also sought.[122] Comcast itself acknowledged that Tennis Channel's "distribution issues" — caused in large part by Comcast — harmed the network's competitive strength in attempting to compete with Comcast for this very content.[123]

This strikingly different treatment of similarly situated networks, with the only meaningful difference among the networks being their affiliation or non-affiliation with Comcast, establishes discrimination under Section 616. Comcast's own documents establish the similarity among these networks, even going so far as to note that Tennis Channel would enjoy

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[120] Initial Decision ¶¶ 55. Comcast objects to the Initial Decision's reliance on this testimony — which Mr. Burke repeated in a declaration submitted in this case — but is forced to admit in a footnote that Madison Bond, "the Comcast Cable official responsible for making distribution decisions," *id.* ¶ 19, provided similar testimony. Exceptions at 20 n. 87; *see also* Bond Tr. 2249:2-18 (conceding that "[t]here's a sibling relationship," and that these "siblings" receive "greater access" to Comcast decision-makers).

Comcast's reliance on *WealthTV*, Exceptions at 20 (citing *WealthTV*, 26 FCC Rcd. at 8982 ¶ 34), is misplaced. In *WealthTV*, the Presiding Judge rejected Mr. Burke's testimony on evidentiary grounds — because it was made in a different case. Here, Comcast offers no such objection because, as it concedes, both Mr. Burke and Mr. Bond offered the testimony in this proceeding. See Tennis Channel Ex. 19-2 (Burke Decl.); Bond Tr. 2249:16-18.

[121] For instance, Comcast distribution executives help affiliates by ensuring they enjoy premium channel placement, assisting them in carriage negotiations with other distributors, and fulfilling distribution requirements to ensure they can retain valuable programming rights. *See* Initial Decision ¶¶ 60-61.

[122] *See, e.g.*, Initial Decision ¶ 26; Tennis Channel Exs. 32, 34, 35, 40, 41, 179; Orszag Tr. at 1407:3-9; Donnelly Tr. at 2626:19 - 2627:17.

[123] *Id.*

comparable valuation to Golf Channel and Versus if Comcast carried it equally.[124] And Comcast's motivation for engaging in this discrimination is plain from the record. Comcast's arguments to the contrary only reinforce the showing of discrimination in this case.

2. Comcast's Attempts to Redefine the Discrimination Standard Fail.

Comcast's arguments regarding discrimination reflect three fundamental legal errors. First, Comcast seeks to ignore entirely its treatment of its affiliated channels. Thus, it does not address its unquestioning grant of the broadest carriage to its channels, regardless of cost. This favorable treatment of Golf Channel and Versus was amply documented in this record, as well as in the Technical Appendix to the Comcast-NBC Merger Order.[125] Section 616 prohibits discrimination on the basis of "affiliation *or* nonaffiliation."[126] Comcast's complete failure to address the special treatment it makes available to its channels on the basis of their affiliation, but not to Tennis Channel because it is unaffiliated, renders its arguments fatally defective.

Second, Comcast's arguments about "deliberate discrimination" seek to impose a virtually unmeetable standard of proof. At the outset, there is no question that Comcast "deliberately discriminated." The record clearly shows that it made deliberate decisions — repeatedly — about broad carriage of, and premium channel placement for, Versus and Golf Channel. It did the same for other sports channels when it acquired an equity interest in them.[127]

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124 In its 2007 valuation of Tennis Channel's equity, Comcast specifically determined that, with broader distribution on Comcast, Tennis Channel's value would [redacted], making it more closely comparable to Golf Channel and Versus. Comcast Ex. 66, at COMTTC_00009011; *see also* Donnelly Tr. at 2654:3-14.

125 *NBCU Order* ¶ 117, Tech. App. ¶¶ 65-71.

126 47 U.S.C. § 536(a)(3) (emphasis added).

127 *See, e.g.*, Initial Decision ¶ 59.

And it acted "deliberately" in refusing to give the same consideration and treatment to Tennis Channel.

Comcast appears to argue that a claimant could only prevail if it produced a plain "smoking gun" admission of "deliberate discrimination," but there is no support in law for that proposition, and the Commission already has rejected it. In its *Second Report and Order*, the Commission recognized that direct "documentary evidence . . . may not exist at all,"[128] and that an unaffiliated network can show affiliation-based discrimination "by providing . . . *circumstantial* evidence of discrimination."[129] Tennis Channel has provided both circumstantial *and direct* evidence of Comcast's discrimination — including, for instance, Comcast's desire to suppress Tennis Channel's ability to compete with Versus for tennis content.

Third, any suggestion by Comcast that Section 616 is impacted by the fact that Comcast and Tennis Channel signed a contract allowing Comcast flexibility as to the carriage level for Tennis Channel is plainly erroneous.[130] Any contract must be read in compliance with the law, and Comcast cannot credibly suggest that its contract entitled it to violate the law.

3. The Marketplace Proves Comcast's Discrimination.

The Presiding Judge correctly rejected Comcast's attempt — repeated here[131] — to justify its carriage of Tennis Channel by comparing it to that of only selected MVPDs. As the

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128 *Second Report & Order* ¶¶ 12-13 ("[W]e recognize that such direct evidence of affiliation-based discrimination will seldom be available to complainants.").

129 *Id.* ¶¶ 12-14 (emphasis added) (permitting complainants to establish affiliation-based discrimination by "provid[ing] evidence that it provides video programming that is similarly situated to video programming provided by a programming vendor affiliated with the defendant MVPD" and that "the defendant MVPD has treated . . . the complainant . . . differently than the similarly situated [affiliate] with respect to the selection, terms, or conditions of carriage").

130 *See generally* Tennis Channel Opp. to Comcast App. for Review (Feb. 6, 2012).

131 Exceptions at 14-16, 18-19.

Initial Decision held, Comcast's analysis is defective because it "ignore[s] a sizable segment of the industry, *e.g.*, telephone companies and satellite MVPDs — indeed, the very MVPDs that Comcast has recognized to be its chief competitors."[132] When *all* of the major MVPDs in the industry are considered, Comcast's [redacted] penetration rate for Tennis Channel pales in comparison to the [redacted] industry average; at the same time, its favoritism for Golf Channel and Versus is clear.[133] Comcast's own economist conceded at trial that Comcast carries Golf Channel and Versus at levels [redacted] percent higher than its competitors.[134] Moreover, the majority of Tennis Channel's distributors do not require their subscribers to pay an extra fee to receive the network, as Comcast does.[135] And, despite Comcast's substantial restraint on Tennis Channel's ability to compete for distribution, the rest of the market is substantially *increasing* Tennis Channel's penetration as time goes on.[136]

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132 Initial Decision ¶ 68. In its Exceptions, Comcast seeks to rely on evidence that the Presiding Judge rejected as irrelevant and untimely after the close of the hearing, such as changes in Tennis Channel's carriage on Comcast's competitor Verizon, which Comcast characterizes as "off- and on-again." *See* Exceptions at 19; *The Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, Order, MB Docket No. 10-204, File No. CSR-8258-P, FCC 11M-26 (ALJ rel. Sep. 26, 2011) (rejecting submission of additional evidence as irrelevant and a "waste[] [of] time"). To the extent that Tennis Channel's recent carriage on Verizon is relevant, it is notable that, following negotiation of a new agreement, Verizon now carries Tennis Channel broadly [redacted]. And Verizon recently announced that it "plans to more widely roll out Tennis Channel next year," *see* Verizon, Press Release, "Tennis Channel, Verizon FiOS TV Sign New Carriage Agreement" (Jan. 17, 2012), *available at* http://newscenter.verizon.com/press-releases/verizon/2012/tennis-channel-verizon-fios.html, [redacted].

133 Singer Written Direct ¶ 54, tbl. 6.

134 *See* Initial Decision ¶ 66; *see also id.* ¶ 67 (citing Dr. Singer's data which show that Tennis Channel's average penetration rate among large MVPDs other than Comcast is almost [redacted] times Tennis Channel's penetration rate on Comcast).

135 Solomon Written Direct ¶ 8.

136 *See* note 132, *supra*; Solomon Written Direct ¶ 8 & n.4.

Tennis Channel's expert economist provided further evidence of this differential treatment. Adapting the method for establishing discrimination that the FCC's economist applied for the Commission's Comcast-NBCU Merger Order, Tennis Channel's economist showed that Comcast carries Tennis Channel [redacted] in markets in which it faces significant competition from another distributor.[137] Thus, where Comcast faces market penalties for discrimination, it discriminates less against Tennis Channel; where that competition is lacking, Comcast's discrimination increases.

4. Comcast's Justifications Are Pretexts.

Comcast also purports to justify its discrimination by citing a series of carriage tests that Tennis Channel supposedly failed: the "cost" test (Tennis Channel costs too much), the "field" test (Tennis Channel did not generate sufficient subscriber interest), and the "date" test (Tennis Channel launched too late). Each of these tests is inconsistent with the record evidence, and each also fails because Comcast applied none of them to its affiliated networks prior to guaranteeing them broad carriage.[138]

a) The Cost Test

Comcast claims to have rejected Tennis Channel's request for fair carriage because it would have cost Comcast too much. But if Tennis Channel costs too much, then the similarly situated Golf Channel and Versus must also fail the "cost" test, as they each cost [redacted] more than Tennis Channel would cost at the same level of distribution.[139] And if Comcast's analysis of the "cost" of carrying Tennis Channel were viewed in isolation from

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137 Initial Decision ¶ 59 n.205 (citing Singer Written Direct ¶ 22).

138 *See, e.g.*, Bond Tr. at 2225:21-2228:8, 2234:15-2235:7, 2297:12-20; Gaiski Tr. at 2419:2-5, 2433:3-8.

139 Initial Decision ¶ 77 & n.257.

other decisions made by Comcast, as the Exceptions urge here, then any MVPD could offer "cost" as the justification for its discrimination because it virtually always costs more to carry a network broadly rather than narrowly.

In another formulation of the "cost" test, Comcast claims that its rejection was motivated by a "cost-benefit analysis."[140] The Presiding Judge rejected this argument, finding no credible evidence that Comcast had performed any evaluation whatsoever of the benefits from Tennis Channel's proposal.[141] Comcast's only response is to claim that "there were no *benefits* to quantify."[142] But the Initial Decision identified a series of potential benefits, such as "additional subscribers or upgrades that might result from the acceptance of Tennis Channel's offer," which Comcast never addressed.[143] Whether or not Comcast agrees now that those benefits existed is irrelevant; it admits that it never considered this question at the time it rejected Tennis Channel's request for carriage.[144]

Nor did Comcast perform a cost-benefit analysis in deciding where to carry Versus and the Golf Channel when it renewed their carriage arrangements around the same time.[145] If a cable operator could avoid Section 616 liability simply by claiming after the fact that it performed a supposed "cost-benefit analysis" that only applies to unaffiliated networks,

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140 Exceptions at 17.

141 Initial Decision ¶ 76.

142 Exceptions at 16-17.

143 Initial Decision ¶ 76 & n.252.

144 *Id.*; *see also* Gaiski Tr. at 2414:3-21, 2437:18-2439:11. As the Initial Decision observes, Comcast executive Jennifer Gaiski — the person who supposedly performed the cost-benefit analysis — admitted on cross-examination that Comcast "'never gave any consideration' to whether or not acceptance of Tennis Channel's offer would generate additional revenues to Comcast Cable through the sale of ad avails on Tennis Channel." Initial Decision ¶ 76 n.252.

145 Initial Decision ¶ 74; Bond Tr. at 2225:21-2228:8.

the statute would lose any meaning.[146]

b) The Field Test

Comcast touts supposed "contemporaneous evidence" that its decision was non-discriminatory, but the Presiding Judge identified serious flaws with that evidence and the testimony given by Jennifer Gaiski, the Comcast executive who sponsored it.[147] Ms. Gaiski testified that she consulted with "the field" — Comcast's term for employees outside of its corporate headquarters — to see whether there was any interest in broader distribution of Tennis Channel.[148] On cross-examination, though, Ms. Gaiski admitted that she prepared the so-called "contemporaneous evidence" because her "lawyer asked [her] to write" it "so that . . . we could point to the fact that we had actually called the field" in subsequent litigation.[149] And although she instructed "the field" to provide her with feedback on the question of broader carriage in "a day or two," Comcast rejected Tennis Channel's proposal the very next day,[150] without waiting for field input. The record also shows that Comcast ordinarily makes carriage decisions with little or no input from "the field," that it mandates to its field broad carriage of Versus and Golf

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146 The Initial Decision did not "requir[e]" that Comcast quantify anything. Instead, it is *Comcast* that raised as its defense a claim that it conducted a "cost-benefit" analysis that, as it turned out, did not exist. If Comcast had offered some other explanation for its decision that did not by its own terms require an "analysis" of "benefits," whether or not Comcast had quantified any benefits would not be an issue.

147 Initial Decision ¶¶ 21-22; 76 n.253.

148 Comcast Ex. 78, Written Direct Testimony of Jennifer Gaiski, at ¶ 16 [hereinafter "Gaiski Written Direct"].

149 Gaiski Tr. 2433:19-2434:22.

150 Comcast's Exceptions claim that "*Tennis Channel* ended negotiations," Exceptions at 18, but that is a distortion. Comcast executive Madison Bond testified that he called Tennis Channel CEO Ken Solomon the day after the so-called "field test" to inform him Comcast "[wasn't] interested in the proposal . . . ." Initial Decision ¶ 23; Bond Tr. 2128:1-14; Gaiski Written Direct ¶ 17.

Channel, and that it has overridden local system efforts to carry Tennis Channel more broadly.[151] This evidence led the Presiding Judge to conclude that the "field test" was merely a "ploy" to avoid liability and not a reflection of *bona fide* consideration of Tennis Channel's request.[152]

c) The Date Test

Finally, Comcast's claim that the Initial Decision "ignored" its supposed application of the "date test" to reject Tennis Channel's carriage request is similarly at odds with the facts.[153] In Comcast's view, the Initial Decision should have found that "changes in market conditions over time" justified its decision to relegate Tennis Channel to the sports tier[154] because it believes that networks launched before the year 2000 should receive and maintain broad carriage, while networks launched after that date can never gain broad distribution.[155]

Far from "ignor[ing]" this point, the Presiding Judge closely analyzed it,

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151 The Presiding Judge found that corporate headquarters "prevented one local Comcast cable system [San Francisco] from carrying Tennis Channel on a broader tier" while requiring its systems to grant broad carriage to Golf Channel and Versus. Initial Decision ¶ 56 & n. 197. *See also id.* ¶ 21 (observing that "[o]ne of the regional executives [contacted by Ms. Gaiski reminded her that] Comcast Cable had told the systems to keep 'all costs flat'); Bond Tr. at 2196:17-2198:14.

152 Initial Decision ¶ 22. Comcast incorrectly argues that the Commission's *MASN* decision "compels the conclusion" that Comcast's discrimination was not affiliation-based. *See* Exceptions at 19 (citing *TCR Sports Broad. Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, 25 FCC Rcd 18099, 18115 (2010), *appeal docketed*, No. 11-1151 (4th Cir. Feb. 22, 2011) [hereinafter "*MASN*"]). In *MASN*, the Commission addressed a situation in which there was a "paucity of documentation" reflecting what factors the defendant MVPD considered in making its carriage decision. *MASN* ¶ 21. Here, the record includes ample evidence that Comcast competed directly with Tennis Channel for advertisers, viewers, and programmers; specifically pursued (and, during the hearing, continued to pursue) telecast rights that Tennis Channel already held; and considered a deal in which it would use its distribution power as leverage to persuade Tennis Channel to give up telecast rights to Versus. *See* Initial Decision ¶¶ 24, 26, 37-47; Tennis Channel Exs. 32, 40, 41, 43, 49, 179. *MASN* cannot be read to suggest that two documents that Comcast admittedly cooked up for use specifically in this litigation can trump such a record.

153 *See* Exceptions at 22-23.

154 *Id.* at 22.

155 *Id.* at 22-23.

ultimately concluding that Comcast's "date test"— which conveniently would grandfather Versus and Golf Channel out of Section 616 scrutiny regardless of the quality of their programming — was contradicted by the record.[156] Specifically, the Presiding Judge observed that in 2009 Comcast placed two recently-affiliated networks, the MLB Network and the NHL Network, on broad tiers even though each was launched *after* Tennis Channel and that it slated another startup affiliated network for similar treatment.[157] In addition, Comcast unquestioningly renewed the contracts of Versus and Golf Channel, while it discriminated against Tennis Channel, without reconsidering their merit (and, as noted, in spite of acknowledging Versus's lack of merit).[158] Given that "Comcast Cable does not carry *any* affiliated network exclusively on the sports tier," regardless of time of launch or renewal, the Presiding Judge properly found that Comcast's "date test" lacked credibility.[159]

II. THE INITIAL DECISION WAS ENTIRELY CONSISTENT WITH THE FIRST AMENDMENT.

Comcast reiterates what the FCC has called an "oft-repeated (and oft-rejected) claim that [the Commission's cable carriage regulation] violates the First Amendment."[160] But

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156 Initial Decision ¶¶ 72-74.

157 *Id.* ¶ 73 (also noting that "in 2010, Comcast Cable made plans to launch its affiliated U.S. Olympic network" — a network that did not have the rights to telecast the Olympics — "on a broadly distributed tier").

158 *Id.* ¶¶ 56, 58; *see also* Bond Tr. at 2225:21-2228:8, 2234:15-2235:7, 2297:12-20; Gaiski Tr. at 2419:2-5.

159 *Id.* ¶ 74. He also rejected Comcast's argument that it did not want to reduce the penetration of existing networks for fear of "upset[ting] customers," observing that Comcast was not worried about upsetting customers when it "moved *unaffiliated* networks to more narrowly penetrated tiers." *Id.* (emphasis in original) (noting, for example, that Comcast "reposition[ed] the NFL network from the Digital Preferred Tier to the sports tier in 2007" but that, according to one of its executives, "'not at any time' did Comcast Cable consider moving Golf Channel or Versus to the sports tier").

160 Opposition of FCC to Emergency Request for a Stay Pursuant to the All Writs Act, *Cablevision Systems Corp. v. FCC*, No. 11-4104, at 27 (2d Cir.) (Oct. 20, 2011).

Comcast's First Amendment claims fare no better here than they did just months ago, when the Commission again rejected them in a decision that Comcast fails even to address.[161] They should be rejected, yet again, here.

A. Comcast Has Articulated No Speech Interest That Is Implicated By The Initial Decision.

It is important to note at the outset what this case is *not* about: Comcast's ability to engage in (or refrain from) speech. It is undisputed that Comcast has carried Tennis Channel voluntarily for years and, as it has reiterated throughout the proceeding, "Comcast makes Tennis Channel available to nearly all of its subscribers who are willing to purchase access to the network."[162] Comcast's longstanding and continued interest in acquiring the rights to tennis programming currently held by Tennis Channel further undermines the suggestion that there is any dispute about whether Comcast has an editorial judgment against distributing Tennis Channel's content.

Thus, the key question before the Commission is whether Comcast should be permitted to charge a discriminatory, unjustified fee to subscribers who wish to access Tennis Channel. In that regard, it is well-established that the First Amendment "does not protect the right to 'fix prices, breach contracts, make false warranties, place bets with bookies, threaten, [or] extort.'"[163] Similarly, Comcast's interest in charging its customers more money for content that it already "makes . . . available" to them is not protected by the First Amendment.[164]

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161 *Second Report & Order* ¶¶ 31-34.

162 Exceptions at 9.

163 *R.A.V. v. City of St. Paul*, 505 U.S. 377, 420 (1992) (Stevens, J., concurring) (quoting Schauer, Categories and the First Amendment: A Play in Three Acts, 34 Vand. L. Rev. 265, 270 (1981)).

164 In that regard, this case is fundamentally different from *Tornillo*, the case cited by Comcast that involved a requirement that a newspaper make space available for a political

Nor is there any factual support in the record for the suggestion that Comcast has an editorial preference that it wishes to exercise with respect to Tennis Channel programming. This point is significant: the HDO specifically identified a carriage remedy as an issue for hearing,[165] and Comcast could have supplied evidentiary support for any editorial discretion claim if such support existed. It did not do so. To the contrary, as noted above, the record reflects Comcast's interest in acquiring tennis content for its own affiliate, making it plain that the factor influencing Comcast's carriage decisions is not content but affiliation.

B. The Program Carriage Rules Are Subject to Intermediate Scrutiny.

Comcast's argument that program carriage regulation is subject to strict scrutiny under the First Amendment is foreclosed by this Commission's precedent. As the Commission observed in its recent Second Report and Order, "[t]he D.C. Circuit has already decided [in *Time Warner v. FCC*] that the leased access provision of the 1992 Cable Act is not content-based [and] does not favor or disfavor speech on the basis of the ideas contained therein; rather, it regulates speech based on affiliation with a cable operator."[166] Accordingly, the D.C. Circuit held the leased access provisions were subject to intermediate scrutiny under the First Amendment.[167]

The Commission relied on *Time Warner* and on the Supreme Court's decisions in

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candidate to respond to reporting critical of him or her. *See* Exceptions at 30-31 (citing *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256-58 (1974)). Unlike the regulation at issue there, the Initial Decision does no more than require Comcast to stop discriminating; it does not turn on whether Tennis Channel (or Comcast) engages in any particular type of speech.

165 HDO ¶ 24(b).

166 *Second Report & Order* ¶ 32 (citing *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957, 969 (D.C. Cir. 1996)).

167 *Time Warner*, 93 F.3d at 969.

the *Turner Broadcasting* cases[168] to hold that "[t]he same conclusion applies to the program carriage provision of the 1992 Cable Act."[169] Because Section 616 "regulates speech based on affiliation with an MVPD, not based on its content," the "program carriage rules would be subject to, and would withstand, intermediate scrutiny."[170]

Far from addressing the Commission's controlling decision that intermediate scrutiny applies, Comcast fails even to cite it. That alone is reason to reject Comcast's arguments, but Comcast's underlying reasoning fares no better. Comcast claims that all of the controlling case law is irrelevant here because Section 616 provides relief to a network "based on its content."[171] By this, Comcast means only that one of the many factors considered by the Commission in establishing whether networks are "similarly situated" — that is, competing — is the genre of programming that they offer.[172] While the Initial Decision does evaluate programming similarity, nothing in the decision suggests that the Presiding Judge decided this case on the basis of whether sports or tennis programming, for example, is more or less deserving of protection than anything else — let alone that the decision turns on the ideas in the programming, which would be a requisite for a strict scrutiny standard to apply.[173]

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168 *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) [hereinafter "*Turner I*"]; *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) [hereinafter "*Turner II*"].

169 *Second Report & Order* ¶ 32 ("[B]ecause MVPDs have an incentive to shield their affiliated programming vendors from competition with unaffiliated programming vendors for viewers, advertisers, and programming rights, the program carriage rules promote competition in the video programming market by promoting fair treatment of unaffiliated programming vendors.").

170 *Id.*

171 Exceptions at 33-35.

172 *See Second Report & Order* ¶ 14.

173 *See* Initial Decision ¶¶ 25-36. In any event, if strict scrutiny did apply, the Initial Decision would survive this standard as well.

The "principal inquiry in determining content neutrality [and, therefore, whether strict scrutiny applies] is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys."[174] Here, "[a]lthough the [Initial Decision] 'might in a formal sense be described as content-based' given that [it considers] whether the programming at issue involves sports, there is absolutely no evidence, nor even any serious suggestion, that the Commission issued its regulations to disfavor certain messages or ideas" or that the Presiding Judge adopted the Initial Decision for that purpose.[175]

C. Properly Analyzed, The Program Carriage Rules And The Initial Decision Are Consistent With The First Amendment.

As the applicable precedent makes clear, the Commission's program carriage rules and the Initial Decision easily satisfy intermediate scrutiny. Under that standard, the

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[174] *Turner I*, 512 U.S. at 642 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

[175] *Cablevision Systems Corp. v. FCC*, 649 F.3d 695, 717 (D.C. Cir. 2011) (quoting *BellSouth Corp. v. FCC*, 144 F.3d 58, 69 (D.C. Cir. 1998)).

Comcast seeks to overcome this standard by noting that the Initial Decision considered aspects of the networks' programming (notably, for the purpose of evaluating similarity and competition, not determining whether particular speech was preferred). Exceptions at 33-34. What Comcast omits is that the Initial Decision's "detailed comparison of the three networks' content" was done specifically to address arguments that Comcast itself made: For example, Comcast complains that the Initial Decision evaluated the "'image' that each network's programming projected to viewers," *id.*, but omits that it did so only to evaluate the credibility of Comcast's expert Mr. Egan, who "[i]n direct oral testimony . . . claimed, for the first time, that Tennis Channel is dissimilar to Golf Channel and Versus because it evokes a different image than those two Comcast affiliates." Initial Decision ¶ 30. Comcast cannot present witnesses who specifically ask the Presiding Judge to consider evidence and then argue that his analysis should be rejected solely because he did as Comcast asked. *See, e.g.*, Exceptions at 22-23 (seeking reversal of the Initial Decision because it "ignores evidence" that Mr. Egan urged was relevant).

In addition, the Presiding Judge found that the relevant channels were similar based on a host of factors that had nothing to do with content, including that all three networks "attract affluent viewers," "each [of the three] network[s] is male skewed," they "target the same age groups," and "advertisers on Tennis Channel overlap substantially with advertisers on Golf Channel and Versus." Initial Decision ¶¶ 37, 42, 44, 45. These conclusions, on their own, more than justify a finding that Tennis Channel is similarly situated to Golf Channel and Versus.

regulation must be sustained if "the government's interest is important or substantial and the means chosen to promote that interest do not burden substantially more speech than necessary to achieve the aim."[176]

Here, the purpose of the program carriage rules is to "promote diversity in video programming by promoting fair treatment of unaffiliated programming vendors and providing these vendors with an avenue to seek redress of anticompetitive carriage practices of MVPDs."[177] Those goals — diversity and competition — are central to the 1992 Cable Act, of which Section 616 was a part.[178] Indeed, in adopting the statute Congress concluded that "[t]here is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media."[179]

Comcast does not seriously dispute the importance of diversity and competition.[180] Instead, it argues that the need to protect these interests in the video programming market has somehow vanished. As noted above, the Commission already has recently rejected that view, relying in part on the unprecedented vertical integration inherent in Comcast's recent merger with NBC Universal.[181]

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176 *Time Warner*, 93 F.3d at 969. *See also Turner I*, 512 U.S. at 662.

177 *Second Report & Order* ¶ 32.

178 *See generally Cable Television Consumer Protection and Competition Act of 1992*, Pub. L. No. 102-385, 106 Stat. 1460, § 2 (1992).

179 *Id.* § 2(a)(6).

180 Nor can it. As the Supreme Court concluded in *Turner I*, "promoting the widespread dissemination of information from a multiplicity of sources" and "promoting fair competition in the market for television programming" must be treated as important governmental interests unrelated to the suppression of speech. *Turner I*, 512 U.S. at 662.

181 *See* note 40, *supra*. Importantly, in explaining the claimed absence of public interest harm inherent in that transaction, Comcast expressly — and repeatedly — relied on the continuing vitality of program carriage regulation as a check against its incentive to engage in discrimination. *See* Comcast, General Electric Co. & NBC Universal, Inc., *In re Applications for*

Finally, the Initial Decision simply required Comcast to do the minimum necessary to promote the important statutory purposes inherent in Section 616: to stop discriminating based on affiliation.[182] Giving Comcast the discretion to do that in several ways surely limited the burden on Comcast's carriage discretion. That is particularly so when compared with other regulations to promote diversity and competition — such as mandatory carriage of all local broadcasters or outright limitations on ownership — none of which required the detailed, fact-specific analysis that the Presiding Judge performed here, and each of which has been upheld under the First Amendment.[183] Accordingly, as the Commission has concluded, the program carriage rules (like the Initial Decision) satisfy intermediate scrutiny and are entirely consistent with the First Amendment.[184]

III. THE REMEDY ORDERED IN THE INITIAL DECISION IS PROPER.

Comcast's challenges to the relief properly granted by the Initial Decision are unsupported by the record and under Section 616. Comcast offers two perfunctory and unfounded complaints about the Initial Decision's requirement of comparable channel

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Consent to the Transfer of Control of Licenses: General Electric Co., Transferor, to Comcast Corp., Transferee, Applications & Public Interest Stmt., at 5, 9-10, 111-12. Now that it has been called to account under those same rules, Comcast should not be heard to argue that they are unenforceable. *See also NBCU Order* ¶¶ 121-23 ("condition[ing] the approval of this transaction on the requirement that Comcast not discriminate in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection of, or terms or conditions for, carriage, including in decisions regarding tiering and channel placement").

182 Initial Decision ¶¶ 119-21, 126. Comcast suggests that an order requiring carriage of Tennis Channel would be more defensible under the First Amendment because it would better promote diversity and competition. *See* Exceptions at 37-38. That conclusion, of course, is fundamentally at odds with common sense. Allowing Tennis Channel to compete on equal footing with Versus and Golf Channel plainly promotes competition in the market for video programming. And if Tennis Channel succeeds on its own merits in that competition, it will allow a diverse voice to gain a broader foothold in the marketplace.

183 *See, e.g.*, *Turner II*, 520 U.S. at 215-16; *Time Warner*, 93 F.3d at 967-71; *Time Warner Entm't Co., L.P. v. U.S.*, 211 F.3d 1313, 1323 (D.C. Cir. 2000).

184 *Second Report & Order* ¶¶ 32-34.

placement. Its first — that Tennis Channel "did not even seek such relief in its complaint, let alone establish that repositioning was necessary"[185] — is simply incorrect. Tennis Channel's complaint explained how Comcast's discriminatory conduct includes "the strikingly more favorable channel positioning it affords to the sports networks it owns" [186]; the Media Bureau identified channel placement as a hearing issue[187]; Tennis Channel introduced evidence regarding channel placement at the hearing[188]; and the Enforcement Bureau and the Initial Decision recognized channel placement as a crucial aspect of Comcast's discrimination.[189]

Comcast's alternate channel placement argument — that it is burdensome to comply with the Initial Decision's channel placement ruling — simply lacks record support. Comcast had a full and fair opportunity to make a record on this point yet failed to do so. To the extent there is record evidence, it is that Comcast acts to secure favorable channel placement for its networks when it deems that to be in its interests.[190] Finally, of course, an argument that compliance with the law presents challenges is not an argument for continuing to violate the law.

Comcast's argument that it should not have to pay for any additional carriage of Tennis Channel fares no better.[191] Notably, the argument is at odds with Comcast's other

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185 Exceptions at 38.

186 Compl. ¶¶ 71-73.

187 HDO ¶ 19; *see also id.* ¶ 24 (designating for hearing question of "price, terms, and conditions" of any required carriage, as well as "other carriage-related remedial measures").

188 *See* Proposed Findings of Fact and Conclusions of Law of the Tennis Channel, Inc., at ¶¶ 129-30, 144-47, 208-13 (June 7, 2011) (citing evidence). The ALJ did not "fail[] to consider" any relevant evidence regarding channel placement, Exceptions at 38, and there is no basis for Comcast to seek a second bite at the apple by offering new, post-trial evidence on this issue.

189 *See, e.g.*, Enforcement Bureau's Comments ¶¶ 26, 31; Initial Decision ¶¶ 53, 85.

190 *See* Initial Decision ¶ 61; Tennis Channel Opposition to Comcast's Conditional Petition for Stay, at 17-18, 32 (Feb. 6, 2012).

191 Exceptions at iv, 39.

arguments that the affiliation agreement should control the outcome of this case,[192] [redacted] [193] Regardless, the statutory scheme would be meaningless if MVPDs could be rewarded with free programming after being found in violation of the statute. This concern is especially acute given the lack of a damages remedy under the current rules to compensate Tennis Channel for the harms it has endured as a result of Comcast's discrimination.

CONCLUSION

For the reasons set forth above, the Commission should uphold the Initial Decision and require equal carriage and channel placement at the contract rate Comcast agreed to pay.

Respectfully submitted,

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February 6, 2012

192 *See, e.g.*, Comcast's Application for Review, *passim* (Jan. 19, 2012).

193 *See* Tennis Channel Ex. 144 at §§ 5.1.3, 6.2.1.

CERTIFICATE OF SERVICE

I, Leah E. Pogoriler, hereby certify that on this 6th day of February, 2012, I caused a true and correct copy of the foregoing Reply to Exceptions to Initial Decision to be served by electronic mail upon:

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